Supreme Court, U.S.
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No. 97-1305

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

RAO GOLLAPUDI,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a six year or a three year limitations period applies under 26 U.S.C. § 6531 to the criminal tax offense of failing to pay over employment tax?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Rao Gollapudi prays that this Court issue a Writ of Certiorari to review the November 17, 1997 judgment and opinion of the United States Court of Appeals for the Third Circuit in this case.

CITATIONS OF THE OPINIONS AND ORDERS ENTERED BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported at 130 F.3d 66 (3d Cir. 1997), and is reproduced in the Appendix ("App.") at 1a-21a. The judgment of the Court of Appeals is reproduced at App. 22a-23a. The order of the Court of Appeals denying petitioner's petition for rehearing and suggestion for rehearing in banc is not reported, and is reproduced at App. 52a. The United States District Court for the District of New Jersey's memorandum opinion of its findings is not reported, and is reproduced at App. 24a-41a. The opinion of District Court denying petitioner's motion to dismiss the nine counts of the indictment that are the subject of this petition is reported at 947 F. Supp. 763 (D.N.J. 1996), and is reproduced at App.42a-51a.

STATEMENT OF THE BASIS OF JURISDICTION OF THE SUPREME COURT

The judgment of the Court of Appeals was entered on November 17, 1997. App. 22a-23a. Petitioner's timely petition for rehearing and suggestion for rehearing in banc was denied by the Court of Appeals on December 16, 1997. The jurisdiction of this Court to review the judgment of the Court of Appeals by Writ of Certiorari is conferred by 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

This case involves Section 6531 of Title 26 of the United States Code, 26 U.S.C. § 6531 ("§ 6531" or "Section 6531"), titled "Periods of limitation on criminal prosecutions," which provides:

> No person shall be prosecuted, tried, or punished for any of the various offenses arising under the internal revenue laws unless the indictment is found or the information instituted within 3 years next after the commission of the offense, except that the period of limitation shall be 6 years —
>
> (1) for offenses involving the defrauding or attempting to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner;
>
> (2) for the offense of willfully attempting in any manner to evade or defeat any tax or the payment thereof;
>
> (3) for the offense of willfully aiding or assisting in, or procuring, counseling, or advising, the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a false or fraudulent return, affidavit, claim, or document (whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document);
>
> (4) for the offense of willfully failing to pay any tax, or make any return (other than a return required under authority of part III of subchapter A of chapter 61) at the time or times required by law or regulations;
>
> (5) for offenses described in sections 7206(1) and 7207 (relating to false statements and fraudulent documents);

> (6) for the offense described in section 7212(a) (relating to intimidation of officers and employees of the United States);
>
> (7) for offenses described in section 7214(a) committed by officers and employees of the United States; and
>
> (8) for offenses arising under section 371 of Title 18 of the United States Code, where the object of the conspiracy is to attempt in any manner to evade or defeat any tax or the payment thereof.

This case also involves Section 7202 of Title 26 of the United States Code, 26 U.S.C. § 7202 ("§ 7202" or "Section 7202"), titled "Willful failure to collect or pay over tax," which provides:

> Any person required under this title to collect, account for, and pay over any tax imposed by this title who willfully fails to collect or truthfully account for and pay over such tax shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

STATEMENT OF THE CASE

A. Factual Background

Petitioner Gollapudi was the president and sole shareholder of a company that employed 15 people between 1989 and 1991. App. 2a; *Gollapudi v. United States*, 130 F.3d 66, 67 (3d Cir. 1997). In relevant part, the indictment returned on April 19, 1996 charged Mr. Gollapudi with nine counts of failing to pay over federal income taxes and Federal Insurance Contributions Act ("FICA") taxes for each tax quarter from the fourth quarter of 1989 through the fourth quarter of 1991, in violation of 26 U.S.C.

§ 7202.[1] App. 4a-5a; *Gollapudi*, 130 F.3d at 68. After a bench trial, petitioner Gollapudi was convicted on all nine counts of violating 26 U.S.C. § 7202.[2] App. 5a; *Gollapudi*, 130 F.3d at 68. It is undisputed that the conviction on all nine counts of violating 26 U.S.C. § 7202 must be reversed if a three year limitations period is applicable.

B. Proceedings Below

Prior to trial, petitioner moved to dismiss the first nine counts of the indictment as barred by the statute of limitations. The District Court denied this motion. App. 42a-51a; *United States v. Gollapudi*, 947 F. Supp. 763 (D.N.J. 1996). On November 26, 1996, after a bench trial, the District Court issued a memorandum opinion of its findings, convicting petitioner. App. 24a-41a. On March 3, 1997, the District Court sentenced petitioner to a term of imprisonment of 24 months on each of the twelve counts of the indictment, with all terms to run concurrently.[3]

Notice of appeal from the final judgment of conviction was timely filed on March 10, 1997. Over the Government's objection, the District Court granted Petitioner's motion for bail pending

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1 The indictment also charged Petitioner Gollapudi with three counts of willfully making or subscribing personal tax returns which he did not believe to be true and correct as to every material matter for the years 1989 through 1991, in violation of 26 U.S.C. § 7206(1).

2 Petitioner was also convicted of the three counts of violating 26 U.S.C. § 7206(1). However, petitioner Gollapudi does not seek a writ of certiorari with respect to those counts.

3 The District Court also imposed a three-year term of supervised release on each of counts one through nine, to run concurrently, and a one-year term of supervised release on each of counts ten through twelve, to run concurrently with each other and with the terms on counts one through nine. Special assessments of $50 were fixed on each of the twelve counts.

appeal. Jurisdiction in the Court of Appeals was pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742. On November 17, 1997, the Court of Appeals rendered its opinion affirming petitioner's convictions, with one judge dissenting. A petition for rehearing and suggestion for rehearing in banc was timely filed on December 1, 1997. The petition was denied on December 17, 1997. A petition for a stay of mandate pending this petition was timely filed. The stay was granted on January 9, 1998.

C. The Third Circuit's Decision

1. **The Majority Opinion.** A divided panel of the Court of Appeals for the Third Circuit affirmed the judgment of the District Court. *See* App. 1a-21a; *United States v. Gollapudi*, 130 F.3d 66 (3d Cir. 1997). On the statute of limitations issue, the majority (per Roth, J.) held that the six year statute of limitations was applicable, because "[u]nder a plain reading of [the] statute," it is clear that the offense proscribed by § 7202 falls within the exception to the three year statute of limitations contained in § 6531(4). App. 8a; *Gollapudi*, 130 F.3d at 69. Specifically, the majority held that the willful failure to "truthfully account for and pay over" federal employment taxes constitutes a failure to "pay any tax, or make any return," under § 6531(4). App. 8a; *Gollapudi*, 130 F.3d at 70. The majority found it unnecessary to address well-settled principles of statutory interpretation recognized by this Court and failed to analyze the structure of Section 6531 in a manner consistent with analogous precedent of this Court.

2. **The Dissent.** The dissent (Cowen, J.) would have vacated the convictions of the petitioner for violations of § 7202 due to the expiration of the three-year statute of limitations generally applicable to tax offenses. App. 21a; *Gollapudi*, 130 F.3d at 72. The dissent found that "the meaning of § 6531(4) is anything but plain and unambiguous" and therefore applied the two applicable canons of statutory interpretation ignored by the majority: (i) criminal statutes of limitation are to be interpreted in

favor of repose and (ii) "excepting" clauses are to be narrowly construed -- canons long-recognized by this Court. App. 18a-19a; *Gollapudi*, 130 F.3d at 74. The dissent concluded that "the excepting clause of § 6531(4) must be interpreted narrowly, especially given that the instant statute deals with criminal liability." App. 18a-19a; *Gollapudi*, 130 F.3d at 74-75. The dissent then analyzed the structure of the relevant statutes and concluded that the majority incorrectly dismissed the difference between "pay" in Section 6531(4) and "pay over" in Section 7202. The dissent concluded that the reasons offered by the majority to buttress its opinion wandered "into the forbidden realm of legislative policy-making" and improperly relied on evidence not included in the record. App. 19a-20a; *Gollapudi*, 130 F.3d at 75.

REASONS FOR GRANTING THE WRIT

This petition should be granted because the panel majority's decision effectively eliminates the three year limitations period established by Congress in 26 U.S.C. § 6531, despite the plain language of that provision, in contravention of both principles of statutory interpretation long recognized by this Court, and other relevant precedent of this Court. Moreover, this petition should be granted because of a split among courts as to the statute of limitations applicable to a violation of 26 U.S.C. § 7202.

I. THE MAJORITY'S OPINION CONTRAVENES THE PLAIN LANGUAGE AND STRUCTURE OF 26 U.S.C. §6531

A. The Language of § 6531

As a general rule, prosecutions for internal revenue offenses are barred unless brought within three years after the commission of the offense. The only offenses exempted from this general limitation are specifically identified in § 6531 as subject to a six-year limitations period. The dispute in this case was whether the offense of failing to collect, account for or pay over tax

proscribed by 26 U.S.C. § 7202 is governed by the exception to the general three year rule contained in Section 6531(4).[4]

> Section 6531(4) provides, in relevant part:
>
> No person shall be prosecuted, tried, or punished for any of the various offenses arising under the internal revenue laws unless the indictment is found or the information instituted within 3 years next after the commission of the offense, except that the period of limitation shall be 6 years —
>
> . . .
>
> (4) for the offense of willfully failing to pay any tax, or make any return (other than a return required under authority of part III of subchapter A of chapter 61) at the time or times required by law or regulations;
>
> . . .

The majority concluded that under a "plain reading of the statute," it is "clear" that § 7202 is subject to the six year statute of limitations provided for in § 6531(4). App. 8a; *Gollapudi*, 130 F.3d at 70. It reached this conclusion by focusing on the word "any" in the portion of Section 6531(4) that refers to "failing to pay any tax", and reasoning that the offense of failing to pay over third-party taxes constitutes "the offense" of failing to pay "any tax," and thus, is subject to the six-year statute of limitations. App. 8a; *Gollapudi*, 130 F.3d at 70.

The dispute in this case was not, however, over whether § 6531(4) applies only to certain taxes (as opposed to any tax). Rather, the dispute centered on whether the statutory term "pay" in Section 6531(4) included the failure to "pay over" tax. Congress

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4 It was conceded by the Government that the only potentially applicable exception was Section 6531(4).

took care throughout the Internal Revenue Code to use "pay over" as a statutory term of art, referring to the obligation incurred with respect to third party taxes.[5] Because the statutory term "pay over" means something separate and distinct from the term "pay" as used in Section 6531(4), that provision has nothing to do with the failure to pay over third-party taxes prohibited by § 7202. By subsuming the failure to "pay over" within the general reference to "pay" in § 6531(4), the panel majority judicially repealed the distinction between pay and pay over carefully drawn by Congress throughout the Internal Revenue Code and reached a result at odds with the legislative scheme.

B. The Majority's Decision is Contrary to Canons of Construction Long-Recognized by this Court

By labeling the statute "unambiguous", the majority was able to overlook two basic principles of statutory interpretation, each of which mandates that the six-year exceptions periods contained in Section 6531 be narrowly construed. First, the majority overlooked the principle that criminal limitations statutes are to be liberally interpreted in favor of repose. *Toussie v. United States*, 397 U.S. 112, 115 (1970); *United States v. Scharton*, 285 U.S. 518, 522 (1932). Second, the six-year limitation period

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5 The phrase "pay over" or "paid over" occurs sixteen times in the Internal Revenue Code. It is never used to refer to a taxpayer's payment of his own taxes. Instead, it is a term of art, referring to: (1) third party taxes (*see, e.g.*, §§ 3505(b), 6672(a), 7202, 7501, 7512(a) and (b), and 7803(c)); (2) other amounts collected from third parties (*see, e.g.*, §§ 3304(a)(3) and 7652(b)(3)); and (3) non-tax amounts (*see, e.g.*, §§ 143(g)(3)(D), 150(d)(2)(B), 401(k)(3)(B) and (8)(B), 408(k)(6)(D), 5236, 6096(a), 6325(b) and (d), and 6332(b)(1)). Congress also used the key language of § 7202 and § 6672 (the civil analogue to § 7202) – "to collect, account for and pay over" – in § 7512(a) and (b), relating to the separate accounting requirements for employment and excise taxes collected on behalf of third parties. Clearly, "pay over" has a specific meaning and is not included in or interchangeable with "pay."

upheld by the majority is provided in an "excepting" clause of § 6531, which must be construed narrowly even apart from the general principle of interpreting limitations periods in favor of the defendant. *Scharton*, 285 U.S. at 521-22 (excepting clauses must be narrowly construed); *Waters v. United States*, 328 F.2d 739, 743-44 (10th Cir. 1964) ("Since the six-year limitation is an exception to the general rule, it must be strictly construed to apply to those offenses specifically enumerated.") (citations omitted).

C. The Majority's Decision is Contrary to the Structure of § 6531

An analysis of § 6531 in its entirety reveals additional errors in the majority's reasoning. By their plain terms, the four exceptions set forth in § 6531(5)-(8) have nothing to do with § 7202. Each one is defined with specific reference to a particular statutory section. From this, the majority argued that the express exceptions in § 6531(5)-(8) show that Congress knew how to unambiguously limit the applicability of exceptions in § 6531 to a particular offense when it intended to do so and that § 6531(4) is not therefore limited to the one offense it most clearly describes, a violation of 26 U.S.C. § 7203. App. 9a-10a; *Gollapudi*, 130 F.3d at 70-71.

Although the exceptions set forth in § 6531(1)-(4) do not specifically incorporate particular statutes, the majority overlooked the fact that courts -- including this Court -- have made clear that their application should be narrowly confined. For example, in *United States v. Scharton*, 285 U.S. 518 (1932), this Court held that the predecessor statute to § 6531(1) did not extend to the offense of willfully attempting to evade a tax (currently § 7201), even though the conduct alleged in that case involved falsely understating taxable income. This Court held that the six-year limitation for offenses involving fraud, now set forth in § 6531(1), applied only to cases in which fraud explicitly was made an element of the crime by the statute defining the offense. *Id.* at 521-22; *see also United States v. Block*, 497 F. Supp. at 631. This

Court rejected the Government's contention that the exception applied because any effort to defeat or evade a tax was tantamount to an attempt to defraud the taxing body. Instead, this Court stressed the importance of narrowly construing the six-year exceptions. *Scharton*, 285 U.S. at 520-21. *See Waters v. United States*, 328 F.2d at 743-44 (strictly construing § 6531(2) as not applicable to offense of possessing firearm for which the making tax was not paid); *United States v. Reina*, 172 F. Supp. 113, 119-20 (S.D.N.Y. 1959) (narrowly construing predecessor statutes to § 6531(1) and (2) as restricted to offenses for which fraud or willful tax evasion are essential ingredients).

Similarly, the majority ignored the fact that Sections 6531(2) and (3) track, almost identically, the language of particular statutory offenses. *Cf.* 26 U.S.C. §§ 7201, 7206(2). It is illogical -- and contrary to the principles of statutory interpretation discussed above -- to conclude that these exceptions are applicable to anything other than their corresponding statutory offenses.

Finally, the majority provided no reasoned explanation for dismissing the express language of § 6531(4) that refers to the offense of willfully failing to pay any tax or make any return. This reference to a singular offense is plainly to the offense identified in § 7203, which closely tracks the language of § 6531(4). Where Congress intended an exception to apply to a class of offenses, rather than a particular offense, it knew how to do so. *See* § 6531(1) ("*for offenses involving* the defrauding or attempting to defraud the United States") (emphasis added); *see United States v. Brennick*, 908 F. Supp. at 1019; *Block*, 497 F. Supp. at 632. The language of § 6531(4) corresponds to § 7203, which itself applies to many kinds of taxes and returns. Thus, § 6531(4) applies to the singular offense (defined in § 7203) of failing to pay any of a variety of taxes, but not to unrelated offenses defined by other statutory sections.

In designing the scheme of criminal tax offenses set forth in 26 U.S.C. § 7201 *et seq.*, Congress explicitly distinguished

between the failure to pay a tax and the failure to account for and pay over a tax collected from another. *Compare* 26 U.S.C. § 7203 *with* 26 U.S.C. § 7202. In light of the precise statutory scheme at issue, there is no basis for assuming that Congress intended to exempt § 7202 offenses from the general limitations period by a general reference to "pay" and the omission of any reference to the statutory term of art "pay over".

The majority's reading of the failure "to pay" language of § 6531(4) as including offenses other than the offense set forth in § 7203 proves too much. Virtually every internal revenue offense (other than failure to file violations where no tax was due) can be characterized as a failure to pay a tax. Therefore, if the applicability of § 6531(4) is not confined to the statute which it parrots (§ 7203), the exception that it provides would completely swallow the rule; the Government could always argue that the defendant's conduct involved a failure to pay a tax, and there would be almost no offense in the Internal Revenue Code to which this exception from the three-year statute of limitations would not apply. This is precisely the approach this Court rejected in *Scharton*, when it rejected the Government's argument that any attempt to defeat or evade a tax was an attempt to defraud the taxing body under § 6531(1). The majority failed to even address this Court's decision in *Scharton*.

Finally, the majority determined that having a shorter statute of limitations for § 7202 -- a felony -- than for § 7203 -- a misdemeanor -- creates an illogical and inconsistent result by providing twice as long for the government to prosecute the misdemeanor of an individual failing to file tax returns than for the felony of failing to turn over moneys withheld from employees. On this issue, the majority's decision was little more than an unsuccessful foray into the realm of policy-making that failed to eliminate this statutory anomaly. *Compare e.g.*, 26 U.S.C. §§ 7207 and 7212(a) (misdemeanors with six year limitation periods) with 26 U.S.C. §§ 7206(5), 7213 and 7232 (felonies with three year limitation periods).

In sum, the majority's interpretation turns the limitations statute on its head and results in the exceptions overrunning the general three-year period; this result flies in the face of both the plain language (providing a three-year period, with specifically enumerated six-year exceptions) and the principles of statutory interpretation that mandate liberal construction in favor of repose.

II. COURTS ARE SPLIT ON THE APPLICABLE LIMITATIONS PERIOD

This petition also should be granted because of a split among courts as to the statute of limitations applicable to a violation of 26 U.S.C. § 7202. The issue has been addressed in a fully reasoned opinion by only one circuit court other than the divided panel of the Third Circuit. The majority's opinion was contrary to the soundly reasoned opinions of two separate district courts in other circuits. *Compare Gollapudi*, 130 F.3d 66, *United States v. Musacchia*, 900 F.2d 493 (2d Cir. 1990), *vacated with respect to § 7202 convictions on other grounds*, 955 F.2d 3 (2d Cir. 1991), *United States v. Evangelista*, 122 F.3d 112 (2d Cir. 1997) (reaffirming *Musacchia*), *United States v. Porth*, 426 F.2d 519, 521-22 (10th Cir.), *cert. denied*, 400 U.S. 824 (1970) *with United States v. Brennick*, 908 F. Supp. 1004, 1019 (D. Mass. 1995) and *United States v. Block*, 497 F. Supp. 629, 631 (N.D. Ga. 1980), *aff'd on other grounds*, 600 F.2d 1086 (5th Cir. 1981).

CONCLUSION

For the foregoing reasons, Rao Gollapudi respectfully requests that this Court grant his Petition for Writ of Certiorari.

February 6, 1998

Respectfully submitted,

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APPENDIX

Filed November 17, 1997

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 97-5137

UNITED STATES OF AMERICA

—v.—

RAO GOLLAPUDI,

Appellant

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Criminal Action No. 96-cr-00220)

Argued September 23, 1997

Before: COWEN, ROTH and LEWIS, *Circuit Judges*

(Opinion Filed November 17, 1997)

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OPINION OF THE COURT

ROTH, Circuit Judge.

I. INTRODUCTION

This is an appeal from a twelve-count indictment charging the defendant, Rao Gollapudi, with violating two provisions of the Internal Revenue Code. More specifically, Gollapudi was charged with failing to account for and pay over to the Internal Revenue Service federal income taxes, deducted and collected from the total taxable wages of his employees, between 1989 and 1991, in violation of 26 U.S.C. § 7202. Additionally, Gollapudi was indicted for filing a false per-

sonal income tax return, Form 1040, for the years 1989 through 1991, in violation of 26 U.S.C. § 7206(1). Gollapudi now appeals on the grounds (1) that his prosecution for violating 26 U.S.C. § 7202 is barred by the three-year statute of limitations of § 6531, and (2) that because the responses on the 1040 he filed were truthful he cannot be found guilty of filing a false statement under § 7206(1). For reasons set forth below, we affirm the decision of the District Court.

II. FACTS

From the company's inception in 1984, the appellant, Rao Gollapudi, has been the president and sole shareholder of Softstar Computer Consultants, incorporated ("Softstar"), a Michigan corporation involved in the business of analyzing and improving computer systems for Fortune 500 companies. Following the departure of his partner from the company in 1986. Gollapudi became solely responsible for preparing and filing the company's tax returns and paying the wages of its employees. Shortly after assuming this responsibility, Gollapudi failed to make any payment of employment taxes and stopped filing Employer's quarterly Tax Returns ("941's") with the IRS.

During the years 1989 through 1991, Softstar employed fifteen individuals, who were paid by checks drawn from the company's corporate checking account. Although the checks indicated that federal income taxes and Federal Insurance Contributions Act ("FICA") taxes were being withheld from the employees' wages, Gollapudi did not remit the withheld funds to the IRS. Rather, these funds, totaling approximately $527,828, were deposited into Softstar's corporate checking account where they were used to pay corporate operating expenses.[1] Furthermore, by failing to file 941's, Gollapudi

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[1] In addition, Gollapudi listed the corporate checking account containing these funds on a personal mortgage application in order to overstate his assets.

never reported the collection of these withholding taxes to the IRS and, thus, avoided detection.

After an IRS tax examiner discovered that Softstar had failed to file the required 941's and remit any tax refunds to the federal government, Gollapudi admitted that although he collected the appropriate taxes from his employees, he did not turn over the withholdings to the IRS. Instead, he kept the money in the company. Gollapudi further admitted that, although he was aware of his obligations, he did not file the required 941's, W-2's, or corporate tax forms with the IRS. Subsequently, Gollapudi contacted an accountant, David Karpel, who on behalf of Gollapudi filed the delinquent 941's and corporate tax returns and paid $591,000 in back taxes.

Gollapudi's handling of the withdrawals from his own salary was also questionable. Gollapudi filed a personal income tax return, Form 1040, for the tax years 1989, 1990, and 1991, in which he claimed that he had withheld approximately $6,000 in federal income taxes from himself. This amount was not turned over to the IRS. Additionally, there was a question of whether the funds were in fact withheld. Although the government argued that such funds were not withheld, Gollapudi testified that, because he did not receive a regular salary, his withholdings were calculated in a unique manner. Gollapudi explained that instead of receiving a regular salary, he periodically took disbursements from the company. At the end of each year he received the corporate records, calculated the total sum that he had paid as salary, checked the relevant tax tables and calculated the gross salary that would correspond to the net salary he had actually received. The difference between the gross and net salaries, he argued, was treated as having been withheld from his gross pay.

On April 19, 1996, Gollapudi was indicted on nine counts of failing to account for and pay over to the IRS federal income taxes and FICA taxes, deducted and collected from the total taxable wages of his employees, for the final quarter of 1989 and for all four quarters of the years 1990 and 1991,

in violation of 26 U.S.C. § 7202. In addition, Gollapudi was charged with three counts of filing false personal income tax returns for the calendar years 1989 through 1991 in violation of 26 U.S.C. § 7206(1). Prior to trial, Gollapudi moved to dismiss the first nine counts of the indictment as barred by the three year statute of limitations. This motion was denied. Gollapudi was found guilty on all counts and now appeals.

III. JURISDICTION

This is an appeal from a final Judgment of the United States District Court for the District of New Jersey, entered March 7, 1997. An appeal was filed on March 10, 1997. The District Court had jurisdiction pursuant to 18 U.S.C. § 3231. We have jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742.

IV. DISCUSSION

A. Statute of Limitations.

The first issue before the court is whether a violation of 26 U.S.C. § 7202, which prohibits the willful failure "to collect or truthfully account for and pay over" any tax.[2] is subject to a three- or six-year statute of limitations. For the following reasons, we hold that the violation is subject to a six-year statute of limitations and thus will affirm the decision of the District Court on this issue.

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[2] Section 7202 provides:

> Any person required under this title to collect, account for, and pay over any tax imposed by this title who willfully falls to collect or truthfully account for and pay over such tax shall. In addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned for more than 5 years, or both, together with the costs of prosecution.

26 U.S.C. § 7202.

The statute of limitations governing 26 U.S.C. § 7202, as well as other criminal tax violations, is set forth in 26 U.S.C. § 6531. This section generally provides that criminal tax proceedings must be initiated within three years of the offense, unless the offense falls into one of eight exceptions providing for a six-year period of limitations. Specifically, the relevant section, § 6531(4), provides that:

> No person shall be prosecuted, tried, or punished for any of the various offenses arising under the internal revenue laws unless the indictment is found or the information instituted within 3 years next after the commission of the offense, except that the period of limitations shall be 6 years—
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> * * * *
>
> (4) for the offense of willfully failing to pay any tax, or make any return (other than a return required under authority of part III of subchapter A of chapter 61) at the time or times required by law or regulations;

26 U.S.C. § 6531(4). The question here is whether a failure to "pay over, any tax under § 7202 constitutes a failure to "pay any tax, or make any return," under § 6531(4), and thus is subject to a six rather than three-year statute of limitations.

While the Third Circuit has not yet addressed the issue of whether § 6531(4) applies to criminal offenses under § 7202, the District Court followed the decisions of the Second and Tenth Circuits in holding that prosecutions for violations of § 7202 must be commenced within six years under § 6531(4). Conversely, two district courts that have addressed the issue have held that section 6531(4) does not apply to § 7202 offenses and that the applicable statute of limitations is three years. Gollapudi contends that the two district court cases are more persuasive in their analysis than the opinions of the circuit courts and the District Court in this case.

Relying on *United States v. Block*, 497 F.Supp. 629 (N.D. Ga. 1980), and *United States v. Brennick*, 908 F.Supp. 1004 (D. Mass. 1995), Gollapudi maintains that the plain language of the statute dictates that failure "to pay any tax, or make any return" under § 6531(4) does not encompass "the offense of failing to collect, account for or pay *over* any tax" under § 7202 (emphasis added). Gollapudi contends that because Congress explicitly distinguished between the failure to "pay" a tax and the failure to "pay over" a tax collected from another in other sections of the Internal Revenue Code and did not include such "pay over" language in § 6531, it did not intend to include the failure to "pay over" any tax in § 6531(4).

In support of his first argument, Gollapudi notes that in designing the criminal tax offense set forth in 26 U.S.C. § 7202 *et seq.*, Congress explicitly distinguished between the failure to pay a tax and the failure to pay over a tax collected from another, as is evident in the comparison between §§ 7202 and 7203. Furthermore, Gollapudi maintains that the phrase "pay over" or "paid over" was used by Congress sixteen times in the Internal Revenue Code and, thus, constitutes a statutory term of art, referring to (1) third-party taxes as in §§ 3505(b), 6672(a) and 7501; (2) other amounts collected from third parties as in §§ 3304(a)(3) and 7652(b)(3); and (3) non-tax amounts as in §§ 143(g)(3)(D) and 6096(a). Gollapudi argues that because the phrase is a term of art, "pay over" has a specific meaning which is not included in nor interchangeable with "pay".

Next, Gollapudi argues that because § 6531(4) applies to "the offense" (singular) of willfully failing to pay any tax or make any return, as opposed to any other offense, and because § 7203 is "the offense" which criminalized such acts, Congress intended that § 6532(4) apply only to the offense identified in § 7203,[3] and not to other criminal tax violations.

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[3] Section 7203 provides in relevant part

> Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under

See Block 497 F.Supp. at 632 (finding persuasive fact that 6531(4) is directed at "the offense" of wilfully failing to pay tax, as opposed to class of offenses): *Brennick*, 908 F.Supp. at 1019 (finding that Congress had expressed its will "in reasonably plain terms" that § 6531(4) applies only to single offense described in § 7203).

In interpreting a statute, the starting point is the language of the statute itself. *National Union Fire Ins. Co. of Pittsburgh v. City Sav., F.S.B.*, 28 F.3d 376, 384 (3d Cir. 1984); *United States v. Cicco*, 10 F.3d 980, 984 (3d Cir. 1993). "In most situations. the plain language rule is the preferred method of statutory interpretation." *United States v. Zheng*, 768 F.2d 518, 523 (3d Cir. 1985), *cert. denied*, 474 U.S. 1060 (1986). "[O]nly the most extraordinary showing of contrary intentions" in the legislative history will justify a departure from that language. *Garcia v. United States*, 469 U.S. 70, 75 (1984).

Under a plain reading of this statute, we find it clear that violations of § 7202 are subject to a six-year statute of limitations under § 6531(4). Specifically, 26 U.S.C. § 7202 makes it an offense for an employer to willfully fail to "account for and pay over" to the IRS taxes withheld from employees. Given that § 6531 pertains to "failing to pay any tax," the District Court correctly found that the failure to pay third-party taxes as covered by § 7202 constitutes failure to pay "any tax," and thus, is subject to the six-year statute of limitations under § 6531(4). *United States v. Gollapudi*, 947 F.Supp. 763 (D. N.J. 1996). *Accord United States v. Musacchia*, 900 F.2d 493, 500 (2d Cir. 1990), *cert. denied*, 501 U.S. 1250 (1991) (holding that six-year statute of limitations in § 6531(4) is

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authority thereof to make a return, keep any records, or supply any information, who willfully fails to pay such estimated lax or tax, make such return, keep such records, or supply such information. at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor . . . .

26 U.S.C. § 7202.

applicable to violations of § 7202); *United States v. Porth*, 426 F.2d 519, 522 (10th Cir.) (finding that § 7202 was "clearly within the six-year exception to the general three-year statute of limitations of § 6531"), *cert. denied*, 400 U.S. 824 (1970). *See also United States v. Evangelista*, Nos. 1478. 1479, Dockets 96-1712(L), 96-1718(CON), 1997 WL 459057. at *8 (2d Cir. Aug. 13, 1997) (reaffirming *Musacchia*, holding that six-year statute of limitations applies to offense defined by § 7202).

Although we could conclude our analysis here as the statutory language in § 6531(4) is plain and unambiguous, *United States v. Cicco*, 10 F.3d 980, 984 (3d Cir. 1993) (unambiguous language deemed "conclusive"), we will address why we find the Georgia and Massachusetts cases relied upon by Gollapudi to be unpersuasive.

In *United States v. Block*, the court found that Congress had the statutory scheme of 26 U.S.C. § 7201 *et seq.*, in mind when fashioning § 6531. 497 F.Supp. at 632. This was inferred from the facts that there are specific references to § 7201 *et seq.* provisions in § 6531, and that the language of § 6531 borrows extensively from various § 7201 *et seq.* sections. The *Block* court reasoned "[i]t seems unlikely . . . that Congress would have used the language of so many of the § 7202 *et seq.* code sections when drafting the subsections of § 6531 but omit use of the key words of § 7202 if it had intended to make failure to 'pay over' third-party taxes subject to the six-year statute of limitations." *Id.*

We find this line of reasoning in *Block* unpersuasive. The statute of limitations for all criminal tax violations is set forth in 26 U.S.C. § 6531. The offenses which fall under the eight exceptions to § 6531 are included either by general description of the proscribed conduct or by a reference to a specific section of the code. It is clear to us that where Congress intended to limit the applicability of the § 6531 exceptions, it unambiguously did so. Thus, whereas subsections five, six, seven and eight of § 6531 are expressly limited to offenses arising under §§ 7206(1) and 7202, 7212(a), 7214(a), and 18

U.S.C. § 371 respectively, the District Court correctly held that subsection four contains a general description of offenses, not limited to violations of § 7203 or to any other specific offense. *Gollapudi*, 947 F.Supp. at 766. *Musacchia*, 900 F.2d at 500. As the District Court stated, "[t]he focus must be on the duty imposed by these specific sections of the Code, not on the particular words present or absent in an attempt to reconstruct congressional intent. An employer's duty to pay taxes withheld from his employees is at least as great as the duty to pay personal income taxes." *Gollapudi*, 947 F.Supp. at 767.

Furthermore, the fact that § 6531(4) uses the word "offense" rather than "offenses" does not convince us that Congress intended § 6531(4) to be limited to violations of § 7203. Conversely, we agree with the rationale of the Second Circuit in *United States v. Musacchia* that "the language of section 6531(4)—applying the six-year statute of limitations to 'the offense of willfully failing to pay any tax, or make any return . . . at the time or times required by law or regulations'—suggests that it applied to any of several sections of the Code that define such an offense." 900 F.2d at 500 (citing 26 U.S.C. § 6531(4)).

Moreover, we find the District Court's reliance on the Second Circuit's decision that it would be inconsistent for Congress to have prescribed a six-year limitation period for the misdemeanor offense defined in 26 U.S.C. § 7203 (failure to file a return or pay a tax) while providing only a three-year limitation period for the felony offense defined in § 7202, to be well-founded. *Gollapudi*, 947 F.Supp. at 766 (citing *Musacchia*, 900 F.2d at 500). As the court in *Musacchia* concluded, it would make little sense if the period in which an offense could be prosecuted for the misdemeanor of failing to file a tax return was twice as long as the period in which an offender could be prosecuted for the felony of failure to pay taxes over to the IRS collected on behalf of employees.[4] As

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[4] In support of the application of the three year statute of limitations to an employers failure to "pay over" withheld taxes. the dissent

the District Court stated. "[t]he focus must be on the duty imposed by these specific sections of the Code, not on the particular words present or absent in an attempt to reconstruct congressional intent. An employer's duty to pay taxes withheld from his employees is at least as great as the duty to pay personal income taxes." *Gollapudi*, 947 F.Supp. at 767.

B. *Filing False Income Tax Return.*

The second issue before us is whether the District Court erred in finding Gollapudi guilty of violating § 7206(1), for filing a false personal tax return.[5] In order to find Gollapudi

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argues that it is more difficult for the IRS to detect an individual's failure to pay his own taxes than it is to discover an employers failure to transfer funds withheld from employees. The Assistant U.S. Attorney took the opposite position at oral argument due to the fact that the IRS does not routinely cross-check employees' W-2 forms against the employers' payments into the IRS of taxes withheld from the employees:

> HAINES: Judge Cowen, what I was told in my office is that if someone, In this case Mr. Gollapudi, is filing false withholding so the individual employees file returns that look like there have been taxes withheld because they had W-2s attached, and then in not filing the 941s, is virtually impossible—there is no cross-referencing there so the IRS can tell automatically that the withholdings coming from the employees' personal income taxes are not being actually . . .
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> COURT: Who told you that in your office?
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> HAINES: Someone who worked for the Tax Division and is now a specialist in tax crimes, that actually tried this case below. In fact, this particular case shoes that. Because—they only caught Mr. Gollapudi because the W-2s themselves were hand-written and looked kind of sloppy and that triggered something in one of the IRS agents minds that these might be fraudulent. Then after trying a bunch of blind alley ways, they finally were able to track it back to Mr. Gollapudi and find out he wasn't filing the 941s. But that was the only way he was ever caught. He could have gone on for years and years.

[5] Section 7206(1) provides that any person who, "[w]illfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and comet as to every material matter . . . shall be guilty of a felony . . . ."

guilty of that offense, the government had to prove that (1) defendant made and subscribed a return which was false as to a material matter; (2) the return contained a written declaration that it was made under the penalties of perjury; (3) defendant did not believe the return was true and correct as to every material matter; and (4) defendant falsely subscribed to the return willfully, with the specific intent to violate the law. *United States v. Bishop*, 412 U.S. 346, 350 (1973).

Gollapudi contends that because his tax return was accurate as to the amount of federal income tax withheld from his gross pay and because the form did not ask whether the withholdings were ever submitted, he cannot be found guilty of this offense. Gollapudi argues that the amount of withholdings were accurate in that they reflected a "gross up" process. In addition, relying on two Seventh Circuit decisions, Gollapudi argues that the literal truth of the information on a tax return is a complete defense, even if the response on the return was highly misleading. *United States v. Reynolds*, 919 F.2d 435 (7th Cir. 1990), *cert. denied*, 499 U.S. 942 (1991); *United States v. Borman*, 992 F.2d 124, 126 (7th Cir. 1993) (in establishing violation of § 7206(1), "the untruth must be found in a statement of some material information called for by the form itself, and any implication drawn from the filing of a particular form . . . is simply not enough.").

We must examine the evidence in the light most favorable to the government and sustain the verdict if "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 318 (1979). We conclude that there was ample evidence for the District Court to find that Gollapudi filed a false statement. First, an IRS agent testified that Gollapudi admitted that he prepared and signed the W-2 forms and that they were false. Additionally, although Gollapudi presented evidence that the withholding amounts were true based on his "gross up" method, the District Court found this theory to be without merit based on the testimony of another IRS agent who demonstrated that no withholding was actually made.

Moreover, it was established that the alleged withholding was never submitted to the IRS, but rather, was maintained in Gollapudi's corporate checking account.

Furthermore, Gollapudi's reliance on *Reynolds* and *Borman* is misguided. Both of those cases involved § 7206(1) charges for filing the wrong tax form. *Reynolds*, 919 F.2d at 437 ("Using the wrong form does not violate § 7206(1)."); *Borman*, 992 F.2d at 126 (holding that filing of improper form is not enough to establish false statement for § 7206(1) purposes). Furthermore, in Reynolds, the theory in the indictment was that one specific line (line 7) of the form which was filed was false. 919 F.2d at 437. The Seventh Circuit held that because line 7 was merely derived arithmetically from two other lines, and was thus an accurate reflection of the difference between the other two lines on the form, that the literal truth of the answer was a defense to perjury. *Id.* The Seventh Circuit indicated, however, that if the charge in the indictment had not been limited to that one line or if the defendant had left something blank indicating that he was hiding something, its decision would have been different. *Id.*

Regardless, we hold that the District Court was correct in finding that Gollapudi filed a false statement on a tax return in violation of § 7206(1), in that he misstated the amount of his withholdings. Despite the fact that he understood his obligations, he submitted a form which he did not believe was true and accurate as to every material matter.

V. *CONCLUSION*

For the above reasons, we will affirm the decision of the District Court.

COWEN, Circuit Judge, dissenting.

The majority errs in concluding that the criminal conduct of an employer in failing to pay over taxes withheld from the wages of employees, in violation of 26 U.S.C. § 7202, falls within the fourth exception to the three-year statute of limitations for violations of the internal Revenue Code (I.R.C.), 26 U.S.C. § 6531(4). I respectfully dissent from section IV-A of the majority's opinion that the statute of limitations for violations of § 7202 is six years rather than the normal three years. The conviction of the defendant, Rao Gollapudi, should be vacated due to the expiration of the three-year statute of limitations.

I.

Gollapudi was convicted of failing to transfer funds withheld from his employees' salaries in violation of § 7202. Section 7202 is entitled "Willful failure to collect or pay over tax" and reads as follows:

> Any person required under this title to collect, account for, and pay over any tax imposed by this title who willfully fails to collect or truthfully account for and pay over such tax shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

The statute of limitations for prosecutions under the I.R.C. in general and § 7202 in particular is contained within 26 U.S.C. § 6531. Section 6531 institutes a general, three-year statute of limitations for criminal prosecutions under the I.R.C. but lists eight exceptions qualifying for a six-year statute of limitations. Section 6531 is entitled "Periods of limitation on criminal prosecutions" and reads in relevant part:

> No person shall be prosecuted, tried, or punished for any of the various offenses arising under the internal revenue laws unless the indictment is found or the information instituted within 3 years next after the commission of the offense, except that the period of limitation shall be 6 years-
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> * * *
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> (4) for the offense of willfully failing to pay any tax, or make any return (other than a return required under authority of part III of subchapter A of chapter 61) at the time or times required by law or regulations. . . .

II.

The majority makes several arguments why § 7202 falls within § 6531(4). First, the majority argues that, "[u]nder a plain reading of this statute," it is "clear" that § 7202 falls within § 6531(4). Maj. Op. at 7-8. The majority seizes on the word "any" from the language of 6531(4), "failing to pay any tax," and argues that, since paying over withheld funds is a type of tax, it qualifies as "any tax" under § 6531(4). The meaning of § 6531(4), according to the majority, is "plain and unambiguous[.]" Maj. Op. at 8.

The majority then attempts to confront the argument that, since the exceptions to the three-year statute of limitations which are contained in § 6531 track and explicitly mention the list of offenses in 26 U.S.C. § 7201 *et seq.*, the failure of § 6531(4) to mention § 7202 specifically means that Congress did not intend § 7202 to be included in § 6531(4). The majority offers two responses. First, the majority argues that the exceptions in § 6531 not specifically mentioning sections of § 7201 *et seq.* are to be viewed expansively rather than restrictively. In other words, exceptions (5)-(8) of § 6531 refer to specific sections among § 7201 *et seq.* and thus apply only to the sections enumerated, while § 6531(4) does not delineate specific sections to which it applies and thus covers

an array of offenses including § 7202. Second, the majority rejects Gollapudi's claim that, since § 6531(4) refers to "offense" rather than "offenses," § 6531(4) refers only to one offense, namely § 7203, which uses language very similar to § 6531(4) and covers the offense of failing to "pay any estimated tax . . . or make a return[.]"[1] The majority points to § 6531(4)'s language of "failing to pay any tax, or make any return" as evincing that § 6531(4) applies to more than one type of offense and therefore encompasses § 7202 in addition to § 7203 and possibly other offenses.

The majority subsequently argues that it would be "inconsistent" for Congress to prescribe a six-year statute of limitations for § 7203, the misdemeanor of failing to file a return or pay a tax, and a three-year statute of limitations for § 7202, which is a felony offense. According to the majority, the need to prevent a disparity between the statutes of limitations for a misdemeanor and for a felony should motivate us to subsume § 7202 within § 6531(4). In addition, the majority dismisses Gollapudi's claim that, because § 7202 talks of "paying over" taxes (referring to transferring employees' withheld taxes to the government) while § 6531(4) covers "pay[ing]" a tax (referring to one's own tax obligations), § 6531(4) cannot subsume § 7202.

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[1] Title 26, United States Code, § 7203 is entitled "Willful failure to file return, supply information, or pay tax, and reads in relevant part

> *Any person required under the title to pay any estimated tax or tax, or* required by this title or by regulations made under authority thereof to *make a return*, keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $26,000 ($100,000 in the case of a corporation), or be imprisoned not more than 1 year, or both, together with the cost of prosecution. . . .

(emphasis added).

III.

As the majority states, two circuit courts ruled that § 7202 receives a six-year statute of limitations by virtue of § 6531(4). *See United States v. Porth*, 426 F.2d 519, 521 (10th Cir. 1970); *see also United States v. Musacchia*, 900 F.2d 493, 500 (2d Cir.), *vacated in part on other grounds*, 955 F.2d 3 (2d Cir. 1991). In contrast, two district courts rejected any linkage between § 6531(4) and § 7202, therefore applying the three-year statute of limitations to § 7202. *See United States v. Brennick*, 908 F.Supp. 1004, 1019 (D.Mass. 1995); *see also United States v. Block*, 497 F.Supp. 629, 632 (N.D.Ga. 1980). However, the Tenth Circuit's decision, holding that § 6531(4) covers § 7202, is conclusory and furnishes no analytical assistance or weighty precedential authority. The decision offers a string of citations, but none deals with the relationship between § 7202 and § 6531(4). *See Porth*, 426 F.2d at 521; *see also Block*, 497 F.Supp. at 631 (the cases mentioned in *Porth* do not support *Porth*'s conclusion); *Brennick*, 908 F.Supp. 1018 n.6 (none of the cases cited by *Porth* supports *Porth*'s conclusion). In addition to the lack of analysis, the Tenth Circuit in *Porth* also argued in the alternative, stating immediately after its § 6531(4) pronouncement that the first indictment in the case, which occurred within three years of the offenses, should be looked to for statute of limitations purposes despite the fact that the first indictment was dismissed for technical reasons. *See Porth*, 426 F.2d at 521. The Tenth Circuit itself appears uncertain of the strength of its own § 6531(4) conclusion, undermining the authority of its decision.

IV.

I respectfully disagree with the arguments raised by the majority and by the Second Circuit in *Musacchia*. The majority claims that the plain meaning of § 6531(4) clearly encompasses § 7202, vitiating any need for other techniques of

statutory interpretation. However, the meaning of § 6531(4) is anything but plain and unambiguous. While the majority claims that § 6531(4) is clear by stressing the importance of the word "any[,]" the majority ignores the fact that applying § 6531(4) effectively swallows the general rule of a three-year statute of limitations for tax offenses. Nearly every violation of the I.R.C. translates into an attempt not to pay taxes. Seizing on "any" to broaden the reach of § 6531(4) in order to include § 7202 has the net effect of vastly expanding § 6531(4), shrinking the applicability of the three-year statute of limitations to near oblivion and rendering the other seven exceptions to the three-year statute of limitations nugatory. The majority provides no principled rationale for delineating the contours of its expanded § 6531(4). As I argue below, the term "any" could properly refer only to tax obligations encompassed by the word "pay" but not obligations to "pay over" taxes. Accordingly, the meaning of § 6531(4) is far from plain and unambiguous. It calls for judicial interpretation.

Resolving § 6531(4)'s ambiguity activates two venerated members of the canon of statutory interpretation which the majority ignored. First, 'excepting' clauses are to be interpreted narrowly. See *United States v. McElvain*, 272 U.S. 633, 639, 47 S. Ct. 219, 220 (1926); *see also United States v. Scharton*, 285 U.S. 518, 521-2, 52 S. Ct. 416, 417 (1932). Second, criminal statutes are to be interpreted in favor of repose. *See United States v. Manor*, 404 U.S. 307, 322 n.14, 92 S. Ct. 455, 464 n.14 (1971). These principles provide the framework for determining the meaning and scope of § 6531(4). As a result, the excepting clause of § 6531(4) must be interpreted narrowly, especially given that the instant statute deals with criminal liability.

Moving to the text at issue here, the majority dismisses the difference between the terms "pay" and "pay over" too handily.[2] Both § 7202 and its civil analogue, 26 U.S.C. § 6672, use

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[2] The *Block* Court rejected the argument that "pay" includes "pay over," noting that "although a lay person would probably use this

the term "pay over" in the context of transferring employees' withheld funds to the government, strongly implying that "pay over" is a statutory term of art referring to transferring a third-party's taxes to the government. While the use of the term "pay over" by the United States Code does not rise to the level of a statutory term of art, the term "pay over" does have a strong tendency to refer to transferring a third-party's taxes to the government. Accordingly, the majority misses the point by stressing the importance of "any" in § 6531(4). Even if "any" is to be interpreted expansively as referring to all taxes owed, the expansiveness is only within the category of taxes that are 'paid,' not the category of funds 'paid over.'

V.

The majority argues that having different statutes of limitations for § 7202 and § 7203 would reflect inconsistent decisionmaking on the part of Congress. The answer to the inconsistency charge lies in observing the difference between the crimes of failure to transfer withheld funds and failure to pay one's own taxes. In the case of transferring withheld funds, an employer fails to transfer the funds withheld from several if not hundreds of employees. The more employees affected, the greater the chances that the I.R.S. will discover the crime. In the case of an individual failing to pay his own taxes, such a crime is harder for the I.R.S. to detect since only one individual's return is involved. Accordingly, it would make sense to apply the normal statute of limitations (three years) to the crime of failing to pay withheld taxes since the I.R.S. has greater potential to discover the crime; in the case of the single individual, the I.R.S. has greater difficulty in discovering the crime and needs an extended statute of limitations.[3] Furthermore, even if Congress was inconsistent in

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approach the draftee of s 6531 more likely would have used the terms as are reflected in ss 7201 et seq [sic]." *Block*, 497 F.Supp. at 632 n.2.

[3] The majority contests this by citing the statement of the Assistant U.S. Attorney during oral argument that the I.R.S. does not routinely

authorizing a three-year statute of limitations for § 7202 and a six-year statute of limitations for § 7203, it is not our prerogative to remedy the inconsistency. To interpret a statute in a manner designed to resolve a putative policy-based inconsistency brings the court into the forbidden realm of legislative policy-making.

VI.

Finally, the majority selects the wrong inference from the fact that § 6531 tracks § 7201 *et seq*. While §§ 6531(5)-(8) specifically refer to sections in § 7201 *et seq*., § 6531(4) does not contain an explicit reference. The majority infers from this lack of a specific reference in § 6531(4) that it covers more than just the section it clearly parallels, § 7203, and encompasses § 7202 as well.[4] However, the majority ignores the need to construe excepting clauses restrictively and to interpret criminal statutes in favor of repose. Indeed, § 6531's tracking of § 7201 *et seq*. gives rise to an alternative inference, namely that even though § 6531(4) fails to mention § 7203, § 6531(4) still should be viewed in the context of the tracking by its sister exceptions. In other words, since exceptions (5)-(8) explicitly track sections of § 7201 *et seq*., Congress may have intended § 6531(4) to track § 7203 by virtue of the similarity in language between the two provi-

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cross-check employees' W-2 forms against employers' payments of funds withheld from employees' wages. *See* Maj. Op. at 10 n.4. However, this statement by the AUSA, attributed to "[s]omeone who worked for the Tax Division and is now a specialist in tax crimes," is not contained in the record and reflects a litigation position taken during oral argument. This court should not adopt such a counter-intuitive notion without adequate evidentiary support.

[4] Section 6531(4) is closely aligned with § 7203 since § 6531(4) refers to "the offense of willfully failing to pay any tax, or make any return[,]" § 7203 covers "[a]ny person . . . who willfully fails to pay such estimated tax or tax, make such return" and § 7202 merely adverts to "[a]ny person required to collect, account for, and pay over any tax. . . ."

sions even though § 7203 is not mentioned explicitly. In fact, the close similarity between the diction of § 7203 and § 6531(4) may have obviated the need for § 6531(4) to mention § 7203 explicitly. This argument is buttressed by the contention that § 6531(4) refers to only one "offense" rather than "offenses," which must be § 7203 rather than § 7202 given the similarity of language between § 7203 and § 6531(4). In sum, while the majority's inference is plausible, another possible inference exists. Our duty to construe § 6531(4) restrictively and in favor of repose requires selecting the inference that § 6531(4) tracks only § 7203, not § 7202 as well.

VII.

For the above reasons, I respectfully dissent from the majority's conclusion that violations of § 7202 receive a six-year rather than a three-year statute of limitations. The district court's decision should be reversed and the conviction of Gollapudi vacated due to the expiration of the three-year statute of limitations prior to the commencement of prosecution.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 97-5137

UNITED STATES OF AMERICA

—v.—

RAO GOLLAPUDI,

Appellant

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Criminal Action No. 96-cr-00220)

Present: Cowen, Roth, and Lewis, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel on September 23, 1997.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court dated March 7, 1997 and entered March 11, 1997, be, and the same is hereby affirmed. All of the above in accordance with the opinion of this Court.

ATTEST:

/s/ P. DOUGLAS SISK
Clerk

Dated: November 17, 1997

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Crim. No. 96-220 (WGB)

UNITED STATES OF AMERICA,

—v.—

RAO GOLLAPUDI.

APPEARANCES:

FAITH S. HOCHBERG, UNITED STATES ATTORNEY
By: Carlos F. Ortiz, Assistant U.S. Attorney

PODVEY, SACHS, MEANOR, CATENACCI,
HILDNER & COCOZIELLO, P.C.
By: John O'Toole, Esq.
David L. Kay, Esq.

OPINION

BASSLER, DISTRICT JUDGE:

Defendant Rao Gollapudi was indicted on nine counts of violation of 26 U.S.C. § 7202,[1] the willful failure to collect or

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[1] 26 U.S.C. § 7202, **Willful failure to collect or pay over tax**, reads as follows: "Any person required under this title to collect, account for, and pay over any tax imposed by this title who willfully fails to collect or truthfully account for and pay over such tax shall, in addition to

truthfully account for and pay over federal withholding taxes and FICA taxes, for the final quarter of 1989, for all four quarters of 1990, and for all four quarters of 1991. Additionally, Defendant Rao Gollapudi was indicted on three counts of violation of 26 U.S.C. § 7206(1),[2] willfully making and subscribing false personal income tax returns, for the tax years 1989, 1990, and 1991.

The Defendant waived his constitutional right to a jury trial in a knowing and intelligent manner, after a colloquy with this Court.

After a bench trial, for the following reasons, this Court finds beyond a reasonable doubt the Defendant, Rao Gollapudi, GUILTY of Counts One to Nine of the indictment, violations of 26 U.S.C. § 7202. Furthermore, this Court finds beyond a reasonable doubt the Defendant, Rao Gollapudi, GUILTY of the counts ten to twelve of the indictment, violations of 26 U.S.C. § 7206.

FINDINGS OF FACT

I. BACKGROUND

Rao Gollapudi is the President and sole shareholder of Softstar Computer Consultants, Inc. This corporation was incorporated in Michigan in July 1984 and has operated in New Jersey since 1985.

Though the company began with only two employees, for the years 1989 through 1991, Softstar employed approximately 15 people. At the end of each pay period, Softstar's

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other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution."

[2] 26 U.S.C. § 7206(1), *Fraud and false statements*, reads as follows: "(1) **Declaration under penalties of perjury**.—Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter.

employees were paid their salary by check. The checks reflected the fact that Mr. Gollapudi, as Softstar's President, withheld federal income taxes and Federal Insurance Contributions Act (FICA) taxes from Softstar employees' paychecks. These federal income taxes and FICA taxes that were withheld remained in the corporate checking account. Despite the fact that Mr. Gollapudi withheld the taxes from his employees' paychecks and issued them official Statements of Wages, Forms W-2, Mr. Gollapudi never filed Employer's Quarterly Tax Returns, Forms 941 and never remitted the withheld funds to the Internal Revenue Service. From the last quarter of 1989 to the last quarter of 1991, Mr. Gollapudi failed to remit approximately $320,313 in federal income taxes and FICA taxes withheld from his employees.

For the tax years 1989, 1990, and 1991, Mr. Gollapudi filed his own income tax returns with the Forms W-2 he had generated for all Softstar employees. Using the Forms W-2 as proof of withholding, Mr. Gollapudi took a $6000 tax credit on his personal tax returns, despite the fact that he knew the that the W-2 was fraudulent as Softstar had not remitted any taxes withheld to the federal government.

In April, 1996, the Grand Jury in and for the District of New Jersey returned a twelve-count Indictment charging Rao Gollapudi with violating two provisions of the Internal Revenue Code, 26 U.S.C. §§ 7202 and 7206(1).

II. LEGAL ARGUMENT

In order to establish guilt of tax evasion, the government must prove, beyond a reasonable doubt: (1) the existence of a tax deficiency; (2) an affirmative act constituting an attempted evasion of payment of taxes; and (3) willfulness. *United States v. Ashfield*, 735 F.2d 101, 105 (3d Cir.), *cert. denied*, 105 S.Ct. 189 (1984), citing *Sansone v. United States*, 380 U.S. 343, 351 (1965). Neither the government nor the defendant dispute the existence of a tax deficiency. There is no real dispute that the evidence demonstrates that there was a tax deficiency and that Mr. Gollapudi did undertake affir-

mative acts that constitute an attempted evasion of the payment of taxes. The only issue is willfulness.

A. The Elements of Willfulness.

Willfulness is defined in the tax cases as the "voluntary, intentional violation of a known legal duty." *Cheek v. United States*, 498 U.S. 192 (1991); *United States v. Pomponio*, 429 U.S. 10, 11-13 (1976); *United States v. Bishop*, 412 U.S. 346, 359-60 (1973). Despite the fact that most cases interpret the word willfully in regard to violations of § 7201 and § 7206, the analysis is the same under 26 U.S.C. §§ 7201-07, all of which use the word willfully in the same sense. *United States v. Greenlee*, 517 F.2d 899, 903 (3d Cir. 1975), citing *United States v. Bishop*, 412 U.S. 346 (1973).

In a tax evasion case, willfulness has been defined by this Circuit as "an attempt made voluntarily and intentionally and with specific intent to keep from the government a tax imposed by the income tax laws which it was the legal duty of the defendants to pay to the government and which the defendants knew it was their legal duty to pay." *United States v. Ashfield*, 735 F.2d at 105.

Despite the Supreme Court's references to other formulations of the willfulness standard, the Court has made it clear that in the tax crime context, willfulness means simply a voluntary, intentional violation of a known legal duty. *United States v. Pomponio*, 429 U.S. 10, 12 (1976). The Supreme Court explained its definition by stating "[w]e did not, however, hold that the term [willfully] requires proof of any motive other than an intentional violation of a known legal duty." *Id.* Therefore, it is clear that in proving the defendant acted willfully, it is not necessary that the government establish that the defendant had an evil motive.

The need to prove specific intent for willfulness "does not imply that the government must prove more than that the defendant acted with a guilty mind, i.e., voluntarily and with the deliberate intent to violate the law." *United States v. Greenlee*, 517 F.2d 899, 904 (3d Cir. 1975). "The only bad

purpose or bad motive necessary for the Government to prove. . . is the deliberate intention not to file returns which the defendant knew ought to be filed." *Id.*

The standard for willfulness is clear. However, the inquiry to determine whether a defendant had the specific intent to violate a known legal duty is a fact intensive process, not subject to easy generalization. *Ashfield*, 735 F.2d at 105. Nonetheless, numerous courts have made it plain that the conclusion of willfulness may be reached through inferential proof. *Id.*

The Supreme Court found that "willful tax evasion may be proven by a consistent pattern of underreporting large amounts of income and by the taxpayer's failure to include all his income on his books and records." *Id.* citing *Holland v. United States*, 348 U.S. 121, 139 (1954); *see also United States v. Frank*, 245 F.2d 284, 287-88 (3d Cir. 1957). Likewise, the Third Circuit held that "[w]illfulness, may however, be inferred from circumstantial evidence." *Ashfield*, 735 F.2d at 105. The Third Circuit has also found that "although mere understatement of tax liability cannot substantiate the charge, consistent understatement is evidence of willfulness." *United States v. Alker*, 260 F.2d 135, 148 (3d Cir. 1958).

In another case regarding willfulness of tax evasion, the Third Circuit held "a two year pattern of derelictions in fulfilling defendant's obligations to make timely returns, [is] itself indicative of the willfulness of his actions. . . We are satisfied that the evidence taken as a whole warranted a finding that the failure to file here was attended by the bad purpose of an intention to violate the law by not fulfilling defendant's obligation of timely filing of which he was well aware." *United States v. Greenlee*, 517 F.2d 899, 903 (3d Cir. 1975).

Most recently, in *United States v. Doan*, 710 F.2d 124, 126 (3d Cir. 1983), the Third Circuit held that there was sufficient evidence, independent of defendant's underreporting of income, from which the jury could find the element of willfulness beyond a reasonable doubt. Despite the fact that the

defendant was not assisted in filing his tax return, the Third Circuit noted "he was sophisticated enough in his preparation to itemize deductions for state, local, real estate, and sales taxes, interest paid on loans, contributions and certain business expenses which were contained in records he kept." *Id.* The Court held that the evidence was sufficient given the proof of a long-run pattern of reporting at variance with the taxpayer's defenses, the substantiality of the sums the taxpayer failed to report, and the number of times taxpayer received income checks he claimed to have forgotten. *Id.*

B. Rao Gollapudi Acted Willfully In Failing To Pay Over Taxes For His Employees.

In order to find Mr. Gollapudi guilty of a violation of 26 U.S.C. § 7202, the United States must establish: (1) Defendant Rao Gollapudi was aware of the legal duty to file Forms 941; (2) Defendant Rao Gollapudi was aware of the legal duty to remit the taxes withheld from his employees to the Internal Revenue Service; and (3) Defendant Rao Gollapudi voluntarily and intentionally failed to file Forms 941 and remit the taxes withheld from his employees. (U.S. Atty. Br.)

Mr. Gollapudi's testimony on cross-examination undermined the credibility of his assertion that he did not intend to defraud the government. Furthermore, the testimony of the IRS agents, Softstar's former employees, and Mr. Gollapudi's former partner, Mr. Ayala, all demonstrate that Mr. Gollapudi knew about his obligations regarding withholding taxes, contradicting Mr. Gollapudi's claims of ignorance and negligence. The Court has identified nine important areas in Mr. Gollapudi's testimony which, when taken together, establish that Mr. Gollapudi voluntarily and intentionally violated his known legal duty to file Forms 941 and remit the taxes he had withheld from his employees.

1. Use of the Michigan Address for Softstar Constitutes Fraud.

Mr. Gollapudi established Softstar Computer Consultants in 1984 in Michigan with a partner, Eshwar Ayala. (TR. I, p.9) At the time, there were only two employees, Mr. Gollapudi and Mr. Ayala. (TR. I, p.10) In late 1984, Mr. Gollapudi moved to New York, and in 1985 he moved to New Jersey, taking the company operations with him but leaving the company's mailing address in Michigan. (TR. I, p.11-13)

The address in Michigan used for the corporation was the address of Mr. Ayala's friend, but never the address of any of Softstar's operations. (TR. I, p. 11) Mr. Gollapudi testified that he used the Michigan address because both the employee identification numbers for the Forms W-2 and the certificate of incorporation listed the Michigan address as the corporate headquarters. (TR. I, p.104) He continued to use the Michigan address long after Mr. Ayala had left Softstar. Indicative of Mr. Gollapudi's pattern of suspicious practices is the fact that when problems arose with taxation issues, Mr. Gollapudi told employees that the accountant in Michigan at the corporate headquarters address would take care of all problems. (TR. I, p.180-182)

Despite Mr. Gollapudi's use of the Michigan address, it was not a valid address for the company. Consul-Tec, the company located at Suite 115, 6785 Telegraph Road, Birmingham, Michigan, from 1989 to 1993, stipulated that it was not associated in any manner with Softstar nor did it authorize Softstar to use its address for the receipt of mail. (Stip. Of John Eilerston, Consul-Tec, p.186) Therefore, the use of the Michigan address between 1989 and 1992, if not before 1989, was fraudulent.

Moreover, as Mr. Gollapudi's former partner testified, the Michigan address on the Michigan Annual Profit Report for 1985 for Softstar was changed to Elmhurst, New York. (TR. I, p.21-23). This was done to redirect all correspondence since the defendant was now living in New York and

Mr. Ayala moved to New York where he was working full time for Softstar. (TR. I, p.21-23).

2. Forms 941 Were Submitted For 1984-1987 With Mr. Gollapudi's Knowledge.

During 1984 and 1985, there is no dispute that Softstar prepared and filed Forms 941 with the IRS and also remitted the federal income taxes and FICA taxes withheld from Mr. Gollapudi's salary and Mr. Ayala's salary. (TR. III, p. 16) Despite Mr. Gollapudi's claim that Mr. Ayala alone was responsible for all of the paperwork at that time, Mr. Ayala testified on direct examination that he and Mr. Gollapudi mailed all of the corporate records to their accountants, Hollander, Bordman & Winnick in Michigan and the accountants mailed back the corporate tax returns for their signatures. (TR. I, p. 26-27) The Forms 941 and personal income tax filings were done personally by Mr. Ayala and Mr. Gollapudi.

In 1984 and 1985, there were no employees of Softstar other than Mr. Gollapudi and Mr. Ayala. (TR. III, p.16) Mr. Ayala testified to the fact that Softstar withheld taxes from the salaries of both himself and Mr. Gollapudi. (TR. I, p. 29) These taxes withheld were mailed to the IRS every quarter. (TR. I, p.29) Mr. Ayala also testified that he filed Forms 941 with the IRS on behalf of Softstar every quarter. (TR. I, p.30) On direct examination, Mr. Ayala testified that Mr. Gollapudi had knowledge that the Forms 941 were prepared quarterly and that the money was sent to the IRS quarterly because Mr. Ayala and Mr. Gollapudi lived in the same apartment when Mr. Gollapudi was in Michigan, worked on some of the forms together, and used to do most of their work together. (TR. I, p.30)

In early 1986, Mr. Ayala quit Softstar and left the responsibility for filing Forms 941 solely in the hands of Gollapudi. (TR. III, p.19) Mr. Gollapudi knew that Mr. Ayala had made payments to the IRS and that Mr. Ayala had been filing the forms with him, though Gollapudi was unfamiliar with the

exact number of the form. (TR. III, p.105) Shortly after Mr. Ayala partner left the company, Mr. Gollapudi failed to make any payment of employment taxes to the IRS. After the middle of 1986, Mr. Gollapudi testified that he stopped filing Forms 941 altogether. (TR. III, p. 20-21) On cross-examination, however, the Form 941 for March 1987 was shown to Mr. Gollapudi who vouched for its authenticity. (TR. III, p.112)

Additionally, Mr. Gollapudi has testified to the fact that he knew he had to file. (TR. III, p.21-22) In his meetings with the IRS in September, 1992, Mr. Gollapudi told an IRS agent that he was aware of his responsibilities as an employer as far as paying the employees, filing W-2 forms, making federal tax deposits, and turning everything over to the IRS. (TR. II, p.7) Later however, in his direct testimony, Mr. Gollapudi testified that he did not become aware of the obligation to file Forms 941 until after he met with an accountant in 1992. (TR. III, p.34)

The Court finds that Mr. Gollapudi knew of the obligation to file Forms 941 quarterly and of the obligation to remit the taxes withheld from Softstar's employees.

3. Mr. Gollapudi Purposefully Used Federal Tax Tables In Order To Determine Withholding For Each Employee and Create a W-2 Form Despite The Fact That He Did Not Remit the Taxes.

In order to figure out the withholding taxes and FICA taxes, Mr. Gollapudi testified that he went to the IRS office to pick up a book with the tax tables. (TR. III, p.108) Mr. Gollapudi, on direct examination, testified that he used the federal tax tables to figure out federal withholding tax, FICA, and other taxes. (TR. III, p.22,25) With this information, Mr. Gollapudi would construct false W-2 forms for his employees. (TR III, p.22) On cross-examination, Mr. Gollapudi admitted that he learned how to generate Forms W-2 because he used the W-2s Mr. Ayala prepared to generate the W-2s for his employees. (TR III, p.104)

The Court finds that while Mr. Gollapudi took affirmative acts to comply with federal tax laws regarding his employees by doing the hard part, figuring out the taxes, he also intended to avoid the painful part of the exercise, paying over the taxes to the federal government.

4. Mr. Gollapudi Clearly Understood How The Federal Tax Withholding System Operates.

There is no question that Mr. Gollapudi withheld federal taxes and FICA taxes from his employees' paychecks. Several employees testified that their after-tax checks reflected approximately two-thirds of their actual salary. (TR I, p.115-117, 136-139). All of the Softstar employees who testified agreed that Mr. Gollapudi had complete control over whether Softstar's financial dealings with its employees, whether they received a raise, when they were paid, and how they were paid. (TR. I, p.124) No one else was responsible for the employee withholding taxes.

Mr. Gollapudi even had conversations regarding withholding taxes with his employees. In 1989, Mr. Gollapudi had a conversation with Ashok Mishra in which Mr. Gollapudi told Mr. Mishra that about one third of his salary would be withheld by Softstar for social security taxes, federal taxes, and state taxes. (TR. I, p.174-175) As Mr. Mishra testified on direct examination, "he said it has to be sent to Federal Government, federal tax to Federal Government and state to State government, generally on a quarterly basis." (TR. I, p.176)

These admissions make it clear to the Court that Mr. Gollapudi was well aware of his obligation to make quarterly payments of employee withholding tax to the federal government.

5. Though Mr. Gollapudi Attempted To Structure Events So That It Appeared He Sought Help From An Accountant Before the IRS Contacted Him. It Is Clear That Only After the IRS Contacted Him In May, 1992 Did Mr. Gollapudi Seek Help From An Accountant.

As early as 1986, Mr. Gollapudi recognized that there was a problem in the delinquency of the employment taxes. (TR. III, p.102) Despite his recognition of the problem, he did not attempt to file any returns nor did he seek professional advice. It was not until 1992 that Mr. Gollapudi finally acted to rectify the situation. According to Mr. Gollapudi on direct, he wanted to hire an accountant in 1992 but he waited until after April 15, because he knew the accountant would not be quite as busy. (TR. III, p.31)

Though Mr. Gollapudi testified on direct examination that the first IRS inquiry about his delinquent filing of Forms 941 and payment of taxes was in August, 1992, (TR. III, p. 36), later, on cross-examination, Mr. Gollapudi admitted that prior to the August 1992 call from the IRS, he was contacted by IRS agent Madeline Gillespie in May of 1992. (TR. III, p.71) This contact was in regard to the need for an affidavit from Softstar verifying the financial information on a W-2 form of a Softstar employee, Mr. Vadakkath. (TR. I, p.143-145) Therefore, because Mr. Gollapudi did not contact the accountant until June of 1992, this Court finds Mr. Gollapudi's professed desire to rectify the situation to be unconvincing as the Court credits the phone call from the IRS in May of 1992 as the true motivating factor in getting Mr. Gollapudi to the accountant.

6. The IRS Spotted Softstar's W-2 Forms As Questionable.

The W-2 forms provided by Mr. Gollapudi to his employees had certain characteristics which made the IRS spot the forms as potentially false. The W-2s were sloppy and the address of

the company was listed in Michigan, which was atypical for a New Jersey employee. (TR. I, p.153)

After the viewing the suspicious W-2 form, Ms. Gillespie attempted to contact Softstar at the Michigan address by mail. Her efforts were unavailing as her letter was returned as undeliverable. (TR. I, p.158)

Next, Ms. Gillespie contacted Softstar in May of 1992 at the New Jersey office and spoke with Mr. Gollapudi who offered no explanation as to why mail was undeliverable to the Softstar corporate headquarters. (TR. I, p.161) Mr. Gollapudi was evasive in his answers to these questions. Upon further investigation within the IRS, Ms. Gillespie discovered that Softstar had failed to file Forms 941 and failed to remit the funds to the federal government. (TR. I, p.166)

Mr. Gollapudi's testimony regarding the IRS investigation into the false W-2 forms is further evidence of his attempt to cover his tracks. In relating the details of his meeting with people from the IRS in September 1992 where the fraudulent W-2 forms were discussed, Mr. Gollapudi stated "I didn't use 'false' word myself. You know, when they said, 'is it false,' then I would have said 'yes'." (TR. III, p. 40) Despite this admission, which is collaborated by Mr. Roum's testimony, Mr. Gollapudi when asked on direct examination at a later point the question "[a]re you telling me now that you did not admit to them that you filed a false return?" responded, "I did not. Yes." (TR. I, p. 40)

Therefore, the Court finds that Mr. Gollapudi intentionally gave false W-2 forms to his employees.

7. Mr. Gollapudi Attempted To Make His Check Register Comply With The Quarterly Tax System Requirements Only After Meeting with The Accountant.

After Mr. Gollapudi went to see the accountant, David Karpel, Mr. Gollapudi went back and cleaned up all of the records for the years in question and made new entries. (TR. III, p.56) Mr. Karpel told Mr. Gollapudi that he needed to go

back to all of the prior years and input quarterly payroll entries in June of 1992. (TR. III, p.56)

Moreover, the different versions of the check registers listed payments to Mr. Gollapudi in different categories. Mr. Gollapudi did not take a regular salary from Softstar but instead he would take checks from the corporate bank account. In 1990, he classified one of the checks he drew from the corporate account as salary originally, according to the check register. (TR. III, p. 65) However, after the accountant suggested to Mr. Gollapudi that he needed to revise the 1987-1992 check registers to show withholding for each quarter, the check drawn as salary in 1990 was reclassified as an advance. (TR. III, p.65) When confronted with the seeming inconsistency, Mr. Gollapudi changed his justification for the $3000 check several times, calling it a loan given by the company, then calling it a payback for expenses. (TR. III, p.67-68). Additionally, when the government asked Mr. Gollapudi about the different versions of the check registers, Mr. Gollapudi was extremely evasive about whether or not the date reflected on the records was accurate. (TR. III, p.62-64)

This Court finds that the changes to the check registers several years past the 1989-1991 fiscal years was evidence of an intent to defraud the federal government.

8. The Money Withheld As Federal Withholding Taxes and FICA Taxes Was Put Into the Softstar General Corporate Account.

The money that Mr. Gollapudi had withheld from Softstar employees for federal taxes and FICA was put into the general corporate checking account in a bank in Michigan. (TR. III, p. 23) Despite the fact that Mr. Gollapudi testified on direct examination that the money to pay the taxes was always on hand, (TR. III, p.29), upon cross-examination, Mr. Gollapudi admitted that the balance in the bank account was at times below the amount necessary to pay the taxes. (TR. III, p.82)

All parties agree that it is not necessary under the law for taxes withheld by an employer to be segregated from other funds. However, all taxes withheld from the wages of an employee are held by the employer in trust for the government. 26 U.S.C. § 7501(a). It is generally recognized that it is not necessary to segregate the money held in trust for the government from general corporate funds. However, "trust fund taxes are for the exclusive use of the government and cannot be used to pay business expenses of the employer." *Collins v. United States*, 848 F.2d 740, 741-42 (6th Cir. 1988) citing *Gephart v. United States*, 818 F.2d 469, 472 (6th Cir. 1987). "It is no excuse that, as a matter of sound business judgment, the money was paid to suppliers and for wages in order to keep the corporation operating as a going concern—the government cannot be made an unwilling partner in a floundering business." *Collins*, at 741-742, citing *Thibodeau v. United States*, 828 F.2d 1499, 1506 (11th Cir. 1987).

This Court finds the fact that Mr. Gollapudi put the taxes into a general corporate fund which was then used for usual business expenses to be a violation of the public trust and evidence of fraud.

9. Mr. Gollapudi Listed The Large Corporate Account As A Personal Asset and Largely Inflated His Salary.

Furthermore, Mr. Gollapudi admitted to listing the corporate checking account on a personal mortgage application in 1989. (TR. III, p.84) Despite the fact that Mr. Gollapudi signed the application under a line that said that the mortgage application was signed under penalties of perjury, Mr. Gollapudi misstated his salary and his assets. (TR. III, p.86) On cross-examination, Mr. Gollapudi admitted that his income for 1988 was $45,000 and for 1989 was $60,000. (TR. III, p.90-92). However, on this mortgage application, Mr. Gollapudi listed his income as $8000 a month and his wife's income as $3000 a month, for a combined total of $132.000 a year for the Gollapudis. (TR. III, p.91)

The listing of the corporate account as a personal asset further discredits Mr. Gollapudi's testimony. The Court does not credit Mr. Gollapudi's testimony that he did not have any intent to "deliberately, wilfully, or purposely not file forms 941 or remit to the Internal Revenue Service," as testified to on direct. (TR. III, p.30)

Therefore, this Court finds that Mr. Gollapudi was not merely remiss or negligent in filing Forms 941 for Softstar and remitting the funds to the federal government. Mr. Gollapudi knowingly and intentionally violated a known legal duty to file Forms 941 each quarter from 1989-1991. Additionally, this Court finds that Mr. Gollapudi voluntarily and intentionally violated the known legal duty to remit the taxes he had withheld from Softstar's employees. Therefore, this Court finds Defendant Rao Gollapudi guilty of Counts 1-9 of the Indictment.

C. Gollapudi Willfully Violated 26 U.S.C. § 7206(1).

In order to find Mr. Gollapudi guilty of a violation of § 7206(1), the Government must prove, beyond a reasonable doubt: (1) Mr. Gollapudi made and subscribed a return which was false as to a material matter; (2) The return contained a written declaration that it was made under the penalties of perjury; (3) Mr. Gollapudi did not believe the return to be true and correct as to every material matter; and (4) Mr. Gollapudi falsely subscribed to the return willfully, with the specific intent to violate the law. *United States v. Bishop*, 412 U.S. 346, 350 (1973). It is not necessary under § 7206(1) that the United States establish that any tax was due for the years in question, as § 7206(1) regards merely false statements in tax returns. *United States v. Olgin*, 745 F.2d 263, 272 (3d Cir. 1984), *cert. denied*, 471 U.S. 1099 (1985).

Mr. Gollapudi filed federal income tax returns, Forms 1040, for the tax years 1989, 1990, and 1991, with fraudulent Forms W-2 falsely reporting that Softstar had withheld federal income taxes from himself. However, Mr. Gollapudi admitted that to the IRS agent that the W-2s he gave to his employees,

which includes himself, were false, so element one is satisfied. The Court finds that Mr. Gollapudi plainly knew that the taxes that the W-2 claimed had been withheld and paid over had not been paid over. These taxes remained in Softstar's corporate checking account, a fact of which Mr. Gollapudi was well aware. The Court finds that Mr. Gollapudi made and subscribed to a false personal income tax return Form 1040 with knowledge that it was false because he knew the taxes for which he claimed substantial tax credits for the years 1989, 1990, and 1991 had not been paid over to the IRS.

The 1989, 1990, and 1991 forms are each signed by Rao Gollapudi. As the law provides, the fact that an individual's name is signed to a federal income tax return is prima facie evidence for all purposes that the return was signed by the person. 26 U.S.C. § 6064. Each of the Forms 1040 contained a jurat which indicated that the return was signed under penalties of perjury. Therefore, the second element is satisfied.

Because Mr. Gollapudi admitted that the W-2s issued by Softstar were false, and because he had that knowledge when he submitted his W-2 with his Form 1040 that the forms were false because the taxes had not in fact been paid over, Mr. Gollapudi clearly did not believe the return to be true and correct as to every matter. Therefore, the only remaining issue, once again, is whether Mr. Gollapudi falsely subscribed to the return willfully, with the specific intent to violate the law.

As established previously, to prove willfulness, the Government must prove that Mr. Gollapudi acted voluntarily and intentionally in violation of a known legal duty. The Government must show that Mr. Gollapudi was aware of the legal duty to provide truthful information on his federal income tax returns and that he voluntarily and intentionally failed to do so.

Mr. Gollapudi is an educated individual, holding a Bachelors Degree in Chemical Engineering and a Masters Degree in Engineering from India's Institute of Technology. (TR. I, p.12) He is the President of his own corporation, of which he is the sole shareholder.

When Mr. Gollapudi filed his personal income tax Form 1040, he claimed a tax credit of $6000 for taxes he claimed had been withheld but he knew in fact were not withheld from his "salary." With his Form 1040 he submitted a false statement of withholding, Form W-2.

1. Mr. Gollapudi's Two Separate Entities Defense Fails Regarding The Fraud In Filing His Personal Income Taxes.

Mr. Gollapudi attempted to justify the fact that he filed a W-2 form for himself as an employee of Softstar but did not remit the $6000 credited on the W-2 by arguing that he must be considered two separate entities, Mr. Gollapudi, Softstar's President, and Mr. Gollapudi, Softstar's employees. (TR. III, p.97) This attempted distinction is not simply disingenuous. This testimony is so unworthy of belief that it further undermines the credibility of his previous testimony given to support the absence of willfulness. Mr. Gollapudi had knowledge of the fact that Softstar had not paid over any federal taxes withheld from employees' salaries due to the fact that it was his own intentional and voluntary violation of the duty to pay over the taxes withheld. As a result, when Mr. Gollapudi filed his own W-2 form, he committed an act of fraud.

Therefore, this Court finds that Mr. Gollapudi willfully subscribed to the false return with the intent to violate the federal tax laws. Mr. Gollapudi was never formally assigned a salary; instead, Mr. Gollapudi maintained control over the all of the funds in the corporate account, including the funds allegedly withheld from his "salary." In addition to benefiting from the false credit for taxes, Mr. Gollapudi was also able to shield Softstar from any unwanted attention by filing false W-2 forms. The record before the Court makes it clear that Mr. Gollapudi willfully filed false W-2 forms with his personal income tax filing Form 1040. Therefore, this Court finds the defendant guilty of Counts 10 to 12 of the Indictment.

III. CONCLUSION

This Court will enter a judgment of GUILTY on all counts.

/s/ WILLIAM G. BASSLER
William G. Bassler, U.S.D.J.

Date: November 26, 1996

UNITED STATES DISTRICT COURT
D. NEW JERSEY

Crim No. 96-220 (WGB)
Oct. 15, 1996

UNITED STATES OF AMERICA,

Plaintiff,

—v.—

RAO GOLLAPUDI,

Defendant.

United States Department of Justice, United States Attorney, District of New Jersey, Newark, NJ by Faith S. Hochberg, U.S. Attorney, Carlos F. Ortiz, Assistant U.S. Attorney, for United States.

Podvey, Sachs, Meanor, Catenacci, Hildner & Cocoziello, P.C., Newark, NJ by David L. Kay, for Defendant.

OPINION

BASSLER, *District Judge*:

The Defendant moves to dismiss Counts One through Nine of the indictment on the ground that the three year statute of limitations under 26 U.S.C. § 6531 precludes prosecution

of offenses under 26 U.S.C. § 7202. For the following reasons, the motion of the Defendant is DENIED.

I. *BACKGROUND*

Defendant Rao Gollapudi is the president and sole shareholder of Softstar Computer Consultants, Inc., incorporated in Michigan in July 1984, and operated in New Jersey since 1987. Between 1989 and 1991, Softstar employed fifteen (15) people. Despite the fact that Defendant withheld federal income tax and Federal Insurance Contributions Act ("FICA") taxes from his employees' paychecks and issued them W-2 Statement of Wages Forms, Defendant never filed Forms 941, Employer's Quarterly Tax Returns, nor did he remit the withheld funds to the Internal Revenue Service ("IRS"). Defendant allegedly failed to remit to the IRS $320,313 in withheld federal income taxes and FICA taxes collected for his employees from the fourth quarter of 1989 to the fourth quarter of 1991.

On April 19, 1996, a Grand Jury for the District of New Jersey returned a twelve count indictment against Defendant Rao Gollapudi. Counts One through Nine allege violations of 26 U.S.C. § 7202 for failure to collect, account for, and pay over federal income taxes and FICA taxes for each tax quarter from the fourth quarter of 1989 continuing through the fourth quarter of 1991. Furthermore, Counts Ten through Twelve allege violations of § 7206(1) concerning Defendant's filing of false individual income tax returns for the calendar years 1989, 1990, and 1991.

Defendant challenges Counts One to Nine of his indictment as being barred by the three year statute of limitations in 26 U.S.C. § 6531. The Government asserts that Defendant's violation of § 7202 fails under one of the exceptions to the general three year statute of limitations, § 6531(4), which provides for a six year statute of limitations.

In addition to opposing the Defendant's motion to dismiss Counts One to Nine of the Indictment, the Government asks

the Court to order Defendant to provide Reciprocal Discovery as mandated by Fed.R.Crim.Pro. 16(b)(1)(A)-(C).

II. *LEGAL ARGUMENT*

A. 26 U.S.C. § 6531(4) Applies to 26 U.S.C. § 7202.

Defendant has been charged with nine counts of violating § 7202, "Willful failure to collect or pay taxes":

> Any person required under this title to collect, account for, and pay over any tax imposed by this title who willfully fails to collect or truthfully account for and pay over such tax shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

26 U.S.C. § 7202.

The statute of limitations for all criminal tax violations is set forth in 26 U.S.C. § 6531. Under § 6531:

> No person shall be prosecuted, tried, or punished for any of the various offenses arising under the internal revenue laws unless the indictment is found or the information instituted within 3 years next after the commission of the offense, except that the period of limitations shall be six years—
>
> (1) for offenses involving the defrauding or attempting to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner;
>
> (2) for the offense of willfully attempting in any manner to evade or defeat any tax or the payment thereof;
>
> (3) for the offense of willfully aiding or assisting in, or procuring, counseling, or advising, the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a false or

> fraudulent return, affidavit, claim, or document (whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim or document);
>
> (4) for the offense of willfully failing to pay any tax, or make any return (other than a return required under authority of part III of subchapter A of chapter 61) at the time or times required by law or regulations;
>
> (5) for offenses described in sections 7206(1) and 7207 (relating to false statements and fraudulent documents);
>
> (6) for the offense described in section 7212(a) (relating to intimidation of officers and employees of the United States); and
>
> (7) for offenses described in section 7214(a) committed by officers and employees of the United States; and
>
> (8) for offenses arising under section 371 of Title 18 of the United States Code, where the object of the conspiracy is to attempt in any manner to evade or defeat any tax or the payment thereof.

26 U.S.C. § 6531. The offenses which fall under the eight exceptions to § 6531 are included either by a general description of the proscribed conduct or by a specific reference to a section of the Code.

The criminal offense of § 7202 is not one of the specifically enumerated offenses under § 6531(1)-(8). Therefore, it must be determined whether the general description of the proscribed conduct in § 6531(4), "for the offense of willfully failing to pay any tax, or make any return," encompasses the criminal offense under § 7202.

Criminal statutes of limitations exist "to limit exposure to criminal prosecution to a certain fixed period of time following the occurrence of those acts . . . encouraging law enforcement officials promptly to investigate suspected criminal activity." *Toussie v. United States*, 397 U.S. 112, 114-115,

90 S.Ct. 858, 860, 25 L.Ed.2d 156 (1970). The Supreme Court has indicated that criminal statutes of limitation are to be liberally interpreted in favor of repose. *United States v. Marion*, 404 U.S. 307, 322, 92 S.Ct. 455, 464, 30 L.Ed.2d 468 (1971) citing *United States v. Habig*, 390 U.S. 222, 227, 88 S.Ct. 926, 929, 19 L.Ed.2d 1055 (1968), *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 314, 65 S.Ct. 1137, 1142, 89 L.Ed. 1628 (1945).

No court in the Third Circuit has yet addressed the issue of whether § 6531(4) applies to criminal offenses under § 7202. While both the Second Circuit and the Tenth Circuit have found that prosecutions for violations of § 7202 must be commenced within six years under § 6531(4), two district courts that have addressed the issue have held that § 6531(4) does not apply to offenses under § 7202. This Court finds the reasoning of the Circuit courts to be persuasive.

The Tenth Circuit was the first circuit court to address whether § 6531(4) applies to § 7202. *United States v. Porth*, 426 F.2d 519 (10th Cir.), *cert. denied*, 400 U.S. 824, 91 S.Ct. 47, 27 L.Ed.2d 53 (1970). In Porth, the defendant was indicted for a willful failure to truthfully account for and pay over to the IRS, FICA and general income taxes withheld from wages, a willful failure to make an individual income tax return, and a willful failure to file quarterly federal returns for FICA taxes the statute required to be withheld. The Tenth Circuit, without extensive analysis, found that the offenses under § 7202 were "clearly within the six-year exception to the general three-year statute of limitations of § 6531." *Id.* at 521-22.

The Second Circuit also addressed the issue in *United States v. Musacchia*, 900 F.2d 493 (2d Cir.1990); *vacated in part on other grounds*, 955 F.2d 3 (2d Cir.), *cert. denied*, 501 U.S. 1250, 111 S.Ct. 2887, 115 L.Ed.2d 1052 (1991), holding that violations of § 7202 are subject to the exception under § 6531(4) providing for a six year statute of limitation. The Second Circuit based its decision on several grounds.

First, the Second Circuit noted that "[a]lthough § 6531(4) does not track the language of § 7202 precisely, in the Supreme Court's decision in *Slodov v. United States*, 436 U.S. 238, 249, 98 S.Ct. 1778, 1786, 56 L.Ed.2d 251 (1978), the terms 'pay' and 'pay over' were used interchangeably." *Musacchia*, 900 F.2d at 500. In *Slodov*, the Supreme Court used these terms interchangeably when discussing the purposes of § 7202 and its civil penalty counterpart, § 6672, stating that "[s]ections 6672 and 7202 were designed to assure compliance by the employer with its obligation to withhold and *pay* the sums withheld, by subjecting the employer's officials responsible for the employer's decision regarding withholding and payment to civil and criminal penalties for the employers' delinquency." *Slodov*, 436 U.S. at 247, 98 S.Ct. at 1785.

Secondly, the Second Circuit expressly stated "it would be inconsistent for Congress to have prescribed a six-year limitation period for the misdemeanor offense defined in 26 U.S.C. § 7203 (failure to file a return or pay a tax) while providing only a three-year limitation period for the felony offense defined in § 7202." *Mustachia*, 900 F.2d at 600. While Defendant argues that this is merely a superficial argument, the Second Circuit found it to be pure common sense, as it would make little logical sense if the period in which an offender could be prosecuted for the misdemeanor of failing to file a tax return was twice as long as the period in which an offender could be prosecuted for failing to pay taxes collected on behalf of employees over to the IRS. *Id.*

Finally, the Second Circuit found "the language of section 6531(4)—applying the six-year statute of limitations to "the offense of willfully failing to pay any tax, or make any return . . . at the time or times required by law or regulations'—suggests that it applies to any of several sections of the Code that define such an offense." *Id.*

The Second Circuit did consider the only district court case on point to the contrary at the time, *United States v. Block*, 497 F.Supp. 629 (N.D.Ga.1980), but dismissed its reasoning

as unpersuasive. Therefore, the Second Circuit held that § 7202 was subject to the six year period of limitation under § 6531(4).

Defendant asserts that the two district cases on point are more persuasive in their analysis than the opinions of the circuit courts. In *United States v. Block*, the district court went through a detailed analysis of each of the sections of § 6531. *Id.* In its analysis, the court found that Congress had the statutory scheme of 26 U.S.C. § 7201 et. seq. in mind when fashioning § 6531. *Id.* at 632. This was inferred based on the fact that specific mention is made of certain code sections by number in § 6531, and that there is a substantial borrowing of statutory language from certain of the code sections. *Id.* The district court reasoned that "[i]t seems unlikely to the court that Congress would have used the language of so many of the § 7201 *et seq.* code sections when drafting the subsections of § 6531 but omit use of the key words of § 7202 if it had intended to make failure to pay over third party taxes subject to the six year statute of limitations." *Id.* at 632.

This Court disagrees with the district court's opinion that § 6531(4) solely "tracks" the language of § 7203, and therefore does not apply to § 7202. While some of the exceptions under § 6531 are directed toward specific code sections, other exceptions are general descriptions of offenses, reaching beyond a single offense.

Despite the fact that this Court finds the analogy of the Supreme Court's decision in *Slodov* to this issue unpersuasive, this Court finds the Second Circuit's reasoning in *Musacchia* to be more persuasive than the district court's reasoning in *Block*. This Court agrees with the Second Circuit that the language of § 6531(4) "suggests that it applies to any of several sections of the Code that define such an offense" dealing with the failure of an individual to pay taxes. 900 F.d at 500. Under the cardinal rules of statutory interpretation, "[t]he plain meaning of legislation should be conclusive, except in the rare cases in which the literal application of a statute will produce a result demonstrably at odds with the

intentions of its drafters." *Nat'l Union Fire Insurance Co. of Pittsburgh v. City Savings, F.S.B.*, 28 F.3d 376, 384 (3d Cir.1994), citing *United States v. Ron Pair Enter. Inc.*, 489 U.S. 235, 242, 109 S.Ct. 1026, 1031, 103 L.Ed.2d 290 (1989). This Court holds that § 6531(4), like § 6531(1), is a general description of offenses, applicable to numerous tax offenses, including § 7202. If Congress wanted § 6531(4) to apply solely to § 7203, Congress could have limited it specifically to crimes under that statute. Because the plain meaning of § 6531(4) covers offenses under § 7202 and § 7203, this Court finds that the six year statute of limitation applies to offenses under § 7202 and therefore respectfully finds the reasoning in *Block* unpersuasive.

Recently, another district court also held that § 7202 offenses were subject to a three year limitation period. *United States v. Brennick*, 908 F.Supp. 1004 (D.Mass.1995). The district court in *Brennick* found that § 6531(4) referred only to "the offense of willfully failing to pay any tax, or make any return," while § 7202 described the offense of intentionally failing "to collect, account for and pay over" any tax. Id at 1018. The distinction made by the district court was that "pay" in § 6531(4) referred to the direct obligation of a taxpayer, whereas § 7202's phrase "pay over" referred to the obligation of a collection agent such as an employer. *Id.* at 1019. Because this Court interprets § 6531 under the plain meaning rule, "the offense of willfully failing to pay any tax" covers offenses under § 7202, and therefore, this Court also declines to follow the reasoning of *Brennick*.

Furthermore, by using the words "failing to pay *any tax*," which includes the failure to pay third party taxes as covered by § 7202, the language appears to include § 7202 within the six year statute of limitation. In evaluating the predecessor sections to §§ 7202 and 6531, the Ninth Circuit stated that "[i]t is true that a difference exists in respect to the capacity in which the tax monies are held. But the duty to pay is the same . . . It would require a clear manifestation of Congressional intent that the Internal Revenue Code should be

construed to set up one rule for 'special fund' taxes, and another rule for income taxes, before we could do so." *Wilson v. United States,* 250 F.2d 312, 320-21 (9th Cir.1957).

As the legislative history of § 6531 and § 7202 does not provide any guidance as to the reach of the general offense description provisions under 6531(1) and (4), this Court agrees with the analysis of the Second, Tenth, and Ninth Circuits regarding §§ 7202 and 6531. The focus must be on the duty imposed by these specific sections of the Code, not on the particular words present or absent in an attempt to reconstruct congressional intent. An employer's duty to pay taxes withheld from his employees is at least as great as the duty to pay personal income taxes.

B. *Defendant Is Ordered to Provide Reciprocal Discovery.*

Rule 16(b)(1)(A), (B), and (C) of the Federal Rules of Criminal Procedure firmly establishes the right of the United States to reciprocal discovery from a criminal defendant. As Rule 16(b)(1)(A) states:

> If the defendant requests disclosure under subdivision (a)(1)(C) or (D) of this rule, upon compliance with such request by the government, the defendant or request of the government, shall permit the government to inspect and copy or photograph books, papers, documents, photographs, tangible objects, or copies or portions thereof, which are within the possession, custody, or control of the defendant and which the defendant intends to introduce as evidence in chief at the trial.

Fed.R.Crim Pro. 16(b)(1)(A).

The Government has already made a request to the Defendant in a letter dated May 29, 1996 for reciprocal discovery, yet to date, the government has not received any reciprocal discovery from the defendant. Because the United States has made discovery available to the defendant, the government is entitled to reciprocal discovery under Rule 16(b) pre-trial.

Therefore, this Court directs the defendant to disclose all discoverable information.

III. *CONCLUSION*

Because the Court finds that § 6531(4) applies to § 7202, the Defendant's motion to dismiss Counts One through Nine of the Indictment is hereby DENIED. Furthermore, this Court hereby GRANTS the government's request for reciprocal discovery. An appropriate order accompanies this Opinion.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 97-5137

UNITED STATES OF AMERICA

—v.—

RAO GOLLAPUDI,

Appellant.

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Criminal Action No. 96-cr-00220)

Before: SLOVITER, *Chief Judge*, BECKER, STAPLETON, MANSMANN, GREENBERG, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS, MCKEE, and RENDELL, *Circuit Judges*

ORDER

The petition for rehearing *en banc* filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court *en banc*, the petition for rehearing is denied.

Judge Cowen would have granted rehearing.

By the Court,

[ILLEGIBLE] ROTH
Circuit Judge

Dated: December 16, 1997